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No. 92-190

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF IDAHO, ex rel.
DIRECTOR, IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

Brief of Amici Curiae the States of Alaska, Arizona, California, Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming

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QUESTION PRESENTED

Whether the McCarran Amendment, 43 U.S.C. § 666(a), waives the United States' right to plead immunity from Idaho's general stream adjudication procedures, including payment of filing fees for special services rendered by the Idaho Department of Water Resources and judiciary to all claimants.

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INTEREST OF AMICI

Adjudications of water rights in the river basins of the western States are massive, complex and expensive proceedings. Adjudicating the competing claims for this scarce resource requires comparing and settling priorities for all claims, and no adjudication can be effective without the participation of all claimants. The United States is the largest single claimant to water in the West, owning approximately 61 per cent of the land in the 11 coterminous western States and 65 per cent of the land in Idaho.

Amici States have ongoing adjudications that include the United States' water rights claims. The Amici States also have administrative agencies that perform non-adversarial, technical functions similar to those performed by the Idaho Department of Water Resources. Like the Snake River Basin Adjudication, adjudications of other large river basins frequently involve thousands of parties and claims based on uses dating back a century or more. Agency investigation, analysis and correlation of these claims is a difficult and expensive undertaking, but it is far simpler and more efficient than piecemeal adjudication, in which one or several parties would be forced to join others with competing claims. To fund the agencies' services, many States assess claimants a filing fee based on the amount of water rights they claim. The Amici States that assess filing fees have an interest in ensuring that each claimant, including the United States, pays its share. The Amici States that do not assess fees have an interest in ensuring that the United States shares the same burdens and benefits as any other claimant.

SUMMARY OF ARGUMENT

Congress has long recognized the primacy of the western States' interest in allocating water resources within their boundaries, even where the United States claims rights to substantial amounts of water. To make it possible for States to make a

complete determination of water rights within a river system, the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, authorizes States to join the United States as a defendant in suits to adjudicate these rights. In sweeping terms, the Amendment waives the United States' sovereign immunity from application of "the State laws" governing adjudications. Not only are the terms of the McCarran Amendment unequivocal, but the legislative history of the Amendment demonstrates that Congress intended the United States to follow the same rules as any other citizen whose water rights are being adjudicated.

The only exception to this broad waiver of immunity is the proviso "That no judgment for costs shall be entered against the United States . . . ." Textually, the exception is limited to cost judgments imposed at the end of litigation, which shift costs between parties, not filing fees paid up front to defray state administrative expenses in investigating the parties' water rights claims. Nor does the legislative history support the proposition that filing fees are a type of cost included within the exception. When the McCarran Amendment was adopted, state water rights laws routinely distinguished between the two. Moreover, Congress understood that the United States would be required to pay fees to the various States to defray the cost of administrative services those States provided.

Given the plain language of the McCarran Amendment, the context in which it was enacted, and the legislative history that underscores Congress' intent, the United States is wrong in asserting immunity from its obligation to pay the same filing fees that all other parties to water rights adjudications must bear.

ARGUMENT

The question presented is narrow. There is no dispute that the McCarran Amendment waives the federal government's sovereign

immunity. The United States recognizes, as it must, that the Amendment requires the federal government to participate in and be bound by state water rights adjudications. The only question is the scope of the waiver Congress intended. The United States argues that Congress intended that the federal government would be bound by "substantive state laws governing the 'acqui[sition of] water rights by appropriation,'" but not by state procedural rules that govern water rights adjudications.[1] Pet. Br. 24–25 (brackets in original).

The United States' argument is troubling. If the United States were correct, the federal government would not be required to follow state procedural rules designed to ensure the orderly and fair resolution of competing water rights claims. It could disregard state deadlines for filing notice of any water rights it claimed. It could decline to follow rules of evidence that govern other water rights claimants. Or it could file appeals from adverse rulings long after the time for other parties to appeal had passed. To be sure, Congress could have waived only part of its sovereign immunity, as the United States argues. But it is difficult to see why Congress would have required the federal government to participate in state water rights adjudications without also requiring the government to adjudicate its water rights at the same time and in the same manner as other claimants. Neither the text of the McCarran Amendment nor its legislative history supports such an anomalous result.

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[1] Although the specific procedural rule at issue here is the requirement that the United States pay filing fees for the water it claims, the United States stakes out a far broader position. It argues that Congress only waived the government's immunity from substantive state laws governing the appropriation of water rights. Pet. Br. 24–25. It acknowledges but never squarely addresses the fact that its argument, if correct, means that Congress did not intend the United States to be bound by *any* state procedural rule. *See* Pet. Br. 26–28.

The issue divides into two related but separate questions. The first is whether Congress intended to waive the United States' sovereign immunity to state procedural rules generally. More specifically, when Congress expressly barred the United States from pleading that it was not amenable to "State laws . . . by reason of its sovereignty," did Congress intend to include both substantive and procedural laws in the waiver? If it did, the second question is whether a specific exception to this general waiver — that no "judgment for costs" shall be entered against the United States — includes filing fees.

I

On the first question, the United States begins from the proposition that the scope of the waiver expressed in the McCarran Amendment must be judged solely from the statutory text and that no waiver will be found if that text is ambiguous. Focusing on the text, the government argues that because the McCarran Amendment is at least ambiguous as to whether state procedural rules will bind the United States when it participates in water rights adjudications, Congress did not waive the United States' sovereign immunity from these rules. In the States' view, the United States both employs the wrong method of analysis and misapplies the method it uses.

A

The Court has recognized that, as a general rule, a waiver of sovereign immunity will not be found unless the text of the statute is unambiguous. *United States v. Nordic Village*, 112 S. Ct. 1011, 1014 (1992). The Court has also recognized, however, that this general rule does not apply to all statutes. *Ibid.* When a statute contains a broad waiver of sovereign immunity, the Court has neither looked solely to the statutory text to determine the scope of the waiver nor has it required that the scope of the

waiver be stated unambiguously. *Ibid.* (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984); *Block v. Neal*, 460 U.S. 289 (1983); *United States v. Yellow Cab Co.*, 340 U.S. 547 (1951)). Rather, it has employed a searching analysis of both the text and the legislative history to determine how much of the government's sovereign immunity Congress intended to waive.

The McCarran Amendment falls squarely within this latter class of statutes. Like the broad waivers of sovereign immunity the Court noted in *Nordic Village*, the McCarran Amendment's consent for the federal government to be joined in a state water rights adjudication is "all-inclusive." *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971). And the Court has declined to construe the McCarran Amendment's waiver of sovereign immunity narrowly. *Id.*, at 523–25. Not only does the McCarran Amendment contain a broad waiver of sovereign immunity that takes it out of the general rule stated in *Nordic Village*, but the Court repeatedly has looked to the purpose and the legislative history of the McCarran Amendment to resolve textual ambiguities about the scope of the waiver.

The Court, for example, looked to the Senate Report and the subcommittee hearings in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 811–12 (1976), to determine whether the McCarran Amendment waived immunity to adjudicate reserved Indian water rights. The statutory text did not answer that question unambiguously, and if the Court had employed the method of analysis the United States urges here, it would have reached a different conclusion than it did. Similarly, the text of the McCarran Amendment does not unambiguously resolve whether the United States waived immunity to have federal reserved water rights adjudicated in a state proceeding.

Yet, the Court looked to the purpose of the Amendment to conclude that the reference in the statute to "otherwise" acquired water rights included these federal rights. *United States v. District Court for Eagle County*, 401 U.S., at 524; *see Colorado River Water Conservation District v. United States*, 424 U.S., at 810 (explaining the holding in *Eagle County*). The method of analysis the United States urges here cannot be reconciled with either the exception recognized in *Nordic Village* for broad waivers of sovereign immunity or with the method of analysis the Court consistently has employed in interpreting the McCarran Amendment.

With these principles in mind, this brief turns to the text and legislative history of the McCarran Amendment.

B

The terms of the McCarran Amendment are clear. The first sentence provides that the United States may be joined as a defendant in any suit for the adjudication of water rights or the administration of those rights. 43 U.S.C. § 666(a). The second sentence provides that when the United States has been joined in such a suit, it "shal[l] be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. § 666(a). Congress could not have been clearer. It waived the government's right to claim in a state water rights adjudication that sovereign immunity excused it from complying with "the State laws." Read in its usual sense, the phrase "the State laws" includes all laws applicable to a state water rights adjudication.

Certainly, nothing in the language Congress used expressly limits the waiver to substantive state laws generally or to substantive state laws governing the appropriation of water, as the government argues. Rather, the statute refers to "State laws"

in the plural, demonstrating an inclusive not a limited waiver. Nor does the context in which the phrase is used suggest any intent to limit the scope of the waiver. To the contrary, it would make little sense to require the federal government to participate in state water rights adjudications but not follow the procedural rules that provide for the orderly and fair resolution of all the parties' competing claims. Giving the government a free hand to avoid any procedural rule it found objectionable would be directly contrary to Congress' recognition that "comprehensive state systems for adjudication of water rights" are the best means for quantifying water rights in the western States. *See Colorado River Water Conservation District v. United States*, 424 U.S., at 819. The power to ignore state procedural rules, which the United States claims, would allow the federal government to stall or disrupt the very proceedings in which Congress intended it to participate.[2]

The United States advances primarily one argument to defeat or at least call into question the plain meaning of the phrase "the State laws." It argues that this phrase should be read to mean the same thing as the phrase "State law" in the first sentence in the McCarran Amendment. Not only are the two phrases not identical,[3] but the context in which they are used refutes the

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[2] It is no answer to say that the government can always comply with state procedural laws voluntarily, even though it is immune from their application. When Congress was considering the McCarran Amendment, the United States told the subcommittee that there was no need to waive any of the government's sovereign immunity because the government could always voluntarily submit a statement of its claims to the state adjudication. Hearings on S. 18 before the Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., 3–4 (1951). Congress did not find that alternative sufficient.

[3] The first phrase is singular; the second, plural. The first phrase is used as part of a prepositional phrase to identify one source of the United States'

(continued...)

notion that one phrase was intended to draw its meaning from the other. *See United States Department of Energy v. Ohio*, 112 S.Ct. 1627, 1637 (1992) (looking to context to clarify a term's meaning). The first sentence refers to the United States' "acquiring water rights by appropriation under State law," and the phrase "State law" identifies one source of the federal government's water rights. Put another way, the "State law" identified in the first sentence is a body of law under which the United States receives a benefit. The phrase "State laws" is used in the second sentence to identify something quite different — a body of rules the United States cannot avoid when it is joined in a water rights adjudication.

Assigning one meaning to these two phrases leads to incongruous results. The United States has little interest in asserting immunity to avoid those state laws identified in the first sentence — those laws under which it is acquiring water rights. Yet, if the United States' argument is correct, the only point of the second sentence would be to forbid the United States from contesting the application of laws that benefit it. One hesitates to attribute such illogic to Congress, and the general rule of statutory construction on which the United States relies cannot be used to create a plausible ambiguity in the statutory text. Indeed, the Court previously has rejected the government's argument that the reference to the United States' acquisition of water rights under state law defines the scope of other terms in the McCarran Amendment. *See United States v. District Court for Eagle County*, 401 U.S., at 524 (declining to limit the waiver for

[3](...continued)

right to appropriate water. The second is not used to modify anything. Rather, it is the subject of a dependent clause that identifies what Congress has waived.

"otherwise" acquired water rights to rights acquired under state law). There is no reason to retreat from that conclusion here.

Perhaps recognizing the difficulty with this position, the United States advances an alternative rationale. It appears to argue that whatever else the McCarran Amendment waives, it does not waive immunity from fees because a separate, express waiver of immunity is required for either fees or costs. *See* Pet. Br. 29–30.[4] Not only is this argument contrary to the typical method for analyzing the McCarran Amendment, but the United States points to no case that says that immunity from fees must be waived either expressly or separately. The one case the government cites for this proposition, *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986),[5] reasons that a general consent to suit is not sufficient to waive immunity from interest in light of the long-standing rule that interest may not be awarded against the United States. *Shaw* says nothing about fees, and the United States points to no comparable long-standing rule that the United

[4] The United States raises a similar argument earlier. It states that "a congressional waiver of sovereign immunity does not subject the United States to *monetary* liability — particularly liability for fees and costs associated with the adjudication itself — unless the consequence is specifically set out in the statutory text." Pet. Br. 16 (emphasis in original). The United States reads too much into the three cases it cites to support this proposition. Two of the cases, *United States Department of Energy v. Ohio*, *supra*, and *United States v. Nordic Village*, *supra*, did involve monetary claims against the government, but neither stated a different rule for monetary claims than other claims. The third case, *Library of Congress v. Shaw*, 478 U.S. 310 (1986), is far narrower than the rule the United States draws from it and is discussed below.

[5] *See* Pet. Br. 30.

States is immune from paying fees to States for services those States provide,[6] which is the predicate for *Shaw*'s rule.

Indeed, far from supporting the United States, *Shaw* recognizes that when Congress waives the United States' sovereign immunity and makes "specific reference to state law for the rules of decision," it has been careful to provide that the United States is *not* liable for interest "in order to make clear that the United States' immunity from interest does not turn on state law." *Library of Congress v. Shaw*, 478 U.S., at 309–10 n. 6 (discussing the Federal Tort Claims Act). Under this reasoning, the McCarran Amendment's equally "specific reference to state law for the rules of decision" would require that Congress provide that the United States is not subject to filing fees "in order to make clear that the United States' immunity from [such fees] does not turn on state law." *See ibid.*

This is precisely the course Congress took with costs. It expressly excepted costs from the McCarran Amendment's broad waiver of immunity to "State laws" to make clear that the United States remained immune from costs under state law. Congress, however, did not also except fees. And absent some showing that the exception for "costs" includes fees, the limited exception Congress crafted demonstrates that the United States remains subject to state laws requiring filing fees, which were a recognized part of many States' water laws when Congress passed the McCarran Amendment. *See infra* at 20–23.

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[6] All the United States identifies is a practice reflected in notes to federal legislation that the United States is not required to pay fees in federal courts. *See* Pet. Br. 21 n. 6. The fact that Congress may not require the United States to pay for federal services provides no support for the proposition that the United States is immune from paying fees for any state services it receives.

In the States' view, only one plausible reading of the text of the McCarran Amendment is possible. Congress intended the second sentence of the Amendment to waive sovereign immunity as a defense to complying with both state substantive and state procedural rules, including filing fees, in a state water rights adjudication.

The same answer follows if the Court looks beyond the text of the McCarran Amendment to its legislative history, as it consistently has done. The McCarran Amendment was proposed to remedy a recurring problem in the arid and semi-arid western States. The United States held claims to a substantial quantity of water rights in these States, but it consistently refused to participate in state adjudications designed to settle the priority of claims to particular rivers or water systems. Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, 82d Cong., 1st Sess., 3–4 (1951). The United States instead invoked its sovereign immunity and settled disputes or brought class actions in federal court to resolve disputes it could not settle. *Id.*, at 2–3, 6–7, 9, 27.

The United States' litigation strategy was not well received. As witnesses before the Senate Subcommittee explained, the United States' water rights were of such magnitude that its refusal to participate in comprehensive state water rights adjudications effectively prevented the state proceedings from going forward. *Id.*, at 48. The United States' settlement efforts with individual water rights claimants were also viewed as unsatisfactory because, as one Senator put it during the hearings, the government's immunity from suit put the private parties negotiat-

ing with the government "over the barrel."[7] And the government's use of a class-action in federal court was seen as putting other water users at a procedural disadvantage. *Id.*, at 27, 38. Senator Watkins, the chair of the Senate Judiciary Subcommittee that considered the bill, summed up the problem that concerned Congress:

> I just feel that the United States is trying to talk double on the thing. They come in and take advantage of everything that is good for them [under state water law] and keep all the time in a position where they do not have any of the liabilities [under state law] if they can avoid them [by invoking sovereign immunity]. I feel that something ought to be done about that.

Id., at 35.

The McCarran Amendment was Congress' answer to this problem. What is now the text of the McCarran Amendment was drafted in two stages. As initially proposed, the bill gave consent to join the United States in any suit for the adjudication or administration of water rights, but it did not expressly waive the United States' sovereign immunity from complying with state

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[7] During the hearing on the McCarran Amendment, Senator Watkins, the chair of the Judiciary Subcommittee, noted:

> You say that you can settle amicably these matter[s — water rights disputes]. Why is that [the farmers and ranchers] are willing to settle amicably? Because you have them over the barrel. They can't take you anywhere else. They can't go into court and fight for their rights. They have to take what you give them. Of course you can work out a settlement if you have a fellow who hasn't any weapons to fight with.

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 7.

laws. *See id.*, at 1 (setting out the text of the proposed bill).[8] Although the initial draft of the bill only referred to the United States' being joined as a defendant in state water rights adjudications, the representative for the United States Department of Justice, Mr. Veeder, testified that "the implications of this legislation go far beyond the few words contained in it." *Id.*, at 16. He explained that Congress' consent to the United States' being joined in a state water rights adjudication would waive immunity from the application of state substantive doctrines, such as laches.[9] *Ibid.* He also explained that consent to state jurisdiction would require the United States to comply with state procedural rules. Mr. Veeder testified:

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[8] The initial draft of the bill provided:

> That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: *Provided*, That the United States shall have the right of removal to the Federal court of any such suit in which it is a party: *Provided further*, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 1.

[9] Mr. Veeder testified:

> Again, I repeat, Senator, the implications of this legislation go far beyond what appears in the few words contained in it. It would subject us not only to suit, but it would carry with it the possible loss of some of our most valuable rights [through the application of the state doctrine of laches].

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 16.

> You not only have a waiver of immunity, you subject us to the administration of every State. We would be forced — I went back and checked this when I got through with my last conversation with you — we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.

Id., at 14.

The Senate Subcommittee did not share Mr. Veeder's concerns about the breadth of the waiver. To the contrary, the subcommittee members expressed the view that the United States should be required to comply with state law. Senator Watkins, the Senator from Utah, responded that if the United States were going to acquire water rights, "the people of Utah are vitally interested in seeing that the United States goes the full distance, and not only claims all the assets that go along but takes a few of the liabilities and subjects itself to the courts there and has those rights determined." *Id.*, at 14.[10]

The subcommittee hearings make clear that even if the McCarran Amendment had been adopted as it was initially drafted, both the proponents and the opponents of the bill

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[10] Senator Watkins later expressed the view that being forced to comply with the procedural laws of the different western States was simply a consequence of the vast water rights the United States claimed. When a witness in favor of the bill explained that requiring the government to comply with the procedural laws of the different states was not difficult, Senator Watkins posed the following rhetorical questions:

> Senator Watkins: You take any corporation, for instance, that has business in 17 States; it probably has to comply with the law of 17 States.
>
> Mr. Saunders: Exactly.
>
> Senator Watkins: If it did not want to have to comply with 17 different laws, then it should cut its operations down to the size that it does want to take on.

Hearings on S. 18 before the Subcommittee for the Senate Judiciary Committee, *supra*, at 27.

understood that the United States would be required to follow the procedural laws of the various States. As the representative for the Department of Justice put it, the mere consent to be joined in state water rights adjudications "would . . . forc[e]" the federal government to comply with the different procedural rules of each State. *Id.*, at 14.

The proposed bill, however, was amended to make Congress' intent clearer. A witness for an association of western water users, Mr. Saunders, told the subcommittee that the bill should be more explicit than it already was. *Id.*, at 23. He explained that it was his association's "fundamental proposition that when the United States becomes an appropriator of water in a Western State it shall take on exactly the same status and burden as any private appropriator." *Id.*, at 25. Although his association had proposed an alternative bill, Mr. Saunders told the subcommittee that "whatever language would accomplish those purposes would meet with our favor." *Id.*, at 33. Mr. Saunders' also proposed that the bill make clear that the waiver of immunity did not apply to a pending dispute between California and Arizona over the Colorado River. *Id.*, at 32.

The chair of the subcommittee appeared quite receptive to Mr. Saunders' views about amending the bill,[11] and after the subcommittee hearings were completed a proviso was added to

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[11] After Mr. Saunders stated that he was going to suggest "a little different form to the bill and some suggested changes here," Senator Watkins responded that the bill "doesn't quite meet my idea of how it ought to be handled at the moment." Hearings on S. 18 before the Subcommittee for the Senate Judiciary Committee, *supra*, at 30. Senator Watkins then noted that "if we determine a line of action, we hope we can get together and draft a bill that can stand up reasonably well." *Ibid.* When Mr. Saunders later referred to his associations' proposed bill, Senator Watkins replied that although he could not say what the committee would ultimately do "if you have a bill, it may help us draft a bill." *Id.*, at 32.

the bill. *See* S. Rep. No. 755, 82d Cong., 1st Sess., 1 (1951) (setting out the proviso as an amendment to the bill). The first part of the proviso stated that the bill did not apply to disputes over interstate rivers, as Mr. Saunders had suggested. *See ibid.* The second part of the proviso stated that "When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto." *Ibid.* To avoid ambiguity, this second sentence was later moved from the proviso to the body of the bill itself. S. Rep. No. 755, Part 2, 82d Cong., 2d Sess., 2 (1952).

Mr. Saunders' testimony before the Senate Subcommittee is the apparent source of what is now the second sentence in the McCarran Amendment. His concern that the United States be subject to exactly the same rules as any private party participating in a state water adjudication is mirrored in the second sentence, which provides that the United States may not plead that it is not amenable to the state laws in any water rights adjudication. The point of what is now the second sentence of the McCarran Amendment was to make clear that the United States stands in the same position in state court as any other water user: It is bound by the same substantive and procedural rules that apply to everyone else. The United States' contrary interpretation of Congress' language finds no support in the legislative history.[12]

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[12] *Library of Congress v. Shaw*, *supra*, is not to the contrary. In *Shaw*, the Court held that a provision in Title VII making the United States liable "the same as a private person" did not waive the government's immunity from interest, 478 U.S. 319–20, but its reasoning is narrower than the United States suggests, *see* Pet. Br. 30 n. 11. The Court reasoned in *Shaw* that because the United States could not be sued as a Title VII defendant when Congress equated the government's liability with that of a private person, the waiver of immunity was necessarily limited to those fees that could be assessed against

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II

Although the McCarran Amendment waives the United States' ability to refuse to comply with state procedural laws generally, it specifically carves out an exception to that general waiver. A proviso to the Amendment states "[t]hat no judgment for costs shall be entered against the United States" in any suit to adjudicate or administer water rights. 43 U.S.C. § 666(a). The issue that remains is whether this exception to the McCarran Amendment's broad waiver of sovereign immunity includes filing fees as a species of costs. On this point, the United States raises or suggests a number of issues that, in the States' view, have little relevance. It is accordingly helpful to identify initially what is and is not at issue.

The United States says that Idaho uses the filing fees it collects from the government and other claimants to finance water rights litigation against them. Idaho explains why the United States' statement is inaccurate, but the more puzzling question is why Idaho's present use of filing fees is relevant to what Congress intended in 1952 when it passed the McCarran Amendment. Whether Idaho uses the filing fees it collects for an allegedly improper purpose is separate from the question whether

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[12](...continued)

a private plaintiff, which would not include interest. *Id.*, at 319. The fact that Congress later authorized the United States to be sued as defendant in a Title VII action was not sufficient to expand the initial limited waiver. *Ibid.*

In the McCarran Amendment, however, no similar limitation inheres in the views expressed to Congress and reflected in the second sentence of the Amendment that the United States should take on "exactly the same status" as a private litigant. Moreover, to the extent *Shaw* recognizes that Congress' initial waiver exposed the United States to liability for all charges that could be assessed against a private Title VII plaintiff, *Shaw* cuts against the government. It means that Congress' comparable intent here makes the United States liable for all fees a private claimant would have to bear in a state water rights adjudication.

Congress regarded filing fees as a species of costs when it passed the McCarran Amendment. If correct, the United States' argument might bar Idaho from using the fees for one purpose, but it would not prevent Idaho from collecting them to defray non-adversarial expenses.

Similarly, the United States says that Idaho charges the United States a higher filing fee than it charges other water users. Idaho again explains the inaccuracies in the United States' argument. But the more troubling question is what relevance does the United States' argument have to congressional intent. The question whether Congress intended to waive sovereign immunity from filing fees is separate from the question whether a State is assessing those fees unequally. If the United States is correct, it may have a claim for unequal treatment but it does not have a claim that sovereign immunity prevents a State from collecting any filing fee from it.

Finally, the United States notes the high fees it must pay as part of Idaho's water rights adjudication. Fees, however, are tied to water use, and congressional acts passed long after the McCarran Amendment's waiver of immunity, such as the Wild and Scenic Rivers Act, 82 Stat. 906, as amended, 16 U.S.C. § 1271 *et seq.*, dramatically increased the volume of water the United States now claims. These subsequent increases may call into question the wisdom of Congress' earlier waiver, if in fact it waived immunity from filing fees, but they provide no legitimate basis for deciding whether Congress intended to exempt filing fees as well as costs when it enacted the McCarran Amendment in 1952. That statutory question is answered not by questioning the wisdom of Congress' policy choice but by looking to the language and the legislative history of the exemption.

The text of the McCarran Amendment provides no support for the federal government. It excepts "judgment[s] for costs" from the scope of the waiver. Nothing in the statutory language refers to filing fees, nor is there any reason on the face of the statute to think that Congress intended that a reference to "costs" would also include filing fees. The two are not synonymous. A judgment for costs typically is awarded at the end of litigation and shifts the winning party's costs to the losing party. Filing fees, on the other hand, typically are paid to the State at the beginning of the litigation regardless of whether the State claims any water rights. They are used not to shift costs between parties but to defray administrative or judicial expenses associated with the adjudication.[13]

Exceptions to broad waivers of sovereign immunity should be construed narrowly. *United States v. Nordic Village*, 112 S. Ct. at 1014. The text of the McCarran Amendment provides no reason to read the statutory reference to "costs" to mean anything other than what it says. Nor does the legislative history provide any reason to depart from the plain language of the Amendment. On this point, the United States suggests that when the McCarran Amendment was adopted Idaho and other western States used judgments for costs to fund their water rights adjudications. *See* Pet. Br. at 5–6 & n. 1. The point presumably is that Congress

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[13] Water resource agencies, while sometimes nominally designated as parties to the adjudication, are not litigants in the traditional sense. Their technical and administrative services are provided not in the adversarial posture of litigating parties, but as a means to provide due process and to generate information necessary for all claimants to prepare their claims and litigate contested issues. *See, e.g., United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658, 672 (1985). Although some state government entities may submit claims for certification, the water resources agency is not an advocate for those claims, and the claiming agency pays filing fees according to the same schedule as other claimants.

would have understood that excepting "judgment[s] for costs" from the McCarran Amendment also excepted any charge (whether called a fee or a cost) for the same expenses.

The problem with the United States' suggestion is that it rests on an incorrect factual premise. When the McCarran Amendment was adopted, many States distinguished between filing fees, which were used to defray the administrative expenses for water rights adjudications, and judgments for costs, which were assessed against the losing party. For example, the Oregon statutes governing water rights adjudications have distinguished filing fees from judgments for costs since they were first enacted in 1909. *See* 1909 Or. Laws 319. Under settled Oregon law, every person who claims water rights in a state water adjudication is required to pay a filing fee based roughly on the amount of water he or she uses. *See* Or. Comp. Laws § 116-807 (1940); *Pacific Live Stock v. Lewis*, 241 U.S., 440, 452 (1916). Judgments for costs, by contrast, are available against claimants who file an exception in state court to the state water agency's determination of the parties' water rights,[14] and the decision whether to enter a judgment for costs against a party to the judicial proceedings is discretionary with the court. Or. Comp. Laws § 116-814 (1940).[15]

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[14] Under the Oregon statutes, the state water agency determines the various claimants' water rights and files the determination with the circuit court. A claimant who is dissatisfied with the determination may file an exception to the determination in state court, and the court will resolve the issue raised by the exception.

[15] Although the United States says that Oregon recovers its administrative expenses as part of the judgment for costs, Pet. Br. 6 n. 1, it misperceives Oregon law. The Oregon statute it cites to support this proposition was enacted in 1905, *see* 1905 Or. Laws 402, and effectively superseded when Oregon adopted a comprehensive system for water rights adjudication in 1909, *see* 1909 Or. Laws 319.

Oregon's use of filing fees was perhaps one of the most widely known, having been sustained by this Court in *Pacific Live Stock Co. v. Lewis*, *supra*. One of the claims raised in *Pacific Live Stock* was that Oregon's graduated filing fee was extortionate and thus violated due process principles. In rejecting that claim, the Court recognized that Oregon's filing fees were used to defray the "'expense of the state of the investigation, mapping, taking testimony, and other acts in the determination of the claimant's rights... .'" 241 U.S., at 452. It held that the fees were neither extortionate nor in violation of due process. The decision is relevant here not so much for its constitutional holding, but for the recognition resulting from the Court's discussion of Oregon's system. Indeed, even though *Pacific Live Stock* was decided approximately 36 years before Congress enacted the McCarran Amendment, Congress was well aware of the case and quoted it to describe the purposes state water rights adjudications served.[16] S. Rep. No. 755, 82d Cong., 1st Sess., 5 (1951).

Oregon was not alone in distinguishing assessments or fees to recover the administrative expenses of investigating water rights claims from judgments for costs. When the McCarran Amendment was enacted,[17] Arizona and Nevada, Senator McCarran's home State, also distinguished graduated filing fees to recover the administrative agency's investigative expenses

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[16] The Senate Report does not cite that portion of the decision that discusses filing fees, but it does quote part of the decision that discusses the important purposes state water rights adjudications serve.

[17] The following discussion of state statutes is based on the statutes in effect when the McCarran Amendment was passed. It does not necessarily reflect present state water laws. Copies of the statutes or session laws cited are included as exhibits in the record. *See* Idaho Exhibits 243-268.

from judgments for costs.[18] California similarly imposed a five dollar filing fee on each claimant and provided that if the total filing fees collected were not sufficient to cover the administrative agency's investigative expenses, the additional expenses would be apportioned among the water rights claimants and collected separately from the judgment for costs.[19] Other States assessed set filing fees or no filing fees, but did not seek to recoup the expenses the state administrative agencies incurred in performing non-adversarial, investigative services as part of the judgment for costs.[20] Montana, for example, directed that these expenses be borne by the State. *See* Mont. Code Ann. § 89-851 (1947) (costs and expenses incurred by state engineer to be paid

[18] *See* Ariz. Code § 75-122 (1939) (judgment for costs); Ariz. Code § 75-137 (1939) (graduated filing fees for submitting proof of appropriation); Nev. Comp. Laws § 7914 (1930) (graduated filing fees for submitting proof of appropriation); Nev. Comp. Laws § 7922 (1930) (judgment for costs).

[19] The California statutes required the state agency to compute its expenses and apportion any expenses incurred (over and above the filing fees collected) among the claimants. 1943 Cal. Stat. 1641 (§§ 2851 and 2852). The additional expenses or apportionment was assessed and collected separately from the judgment for costs. The apportionment was due when the state agency sent a statement of the additional investigative expenses to the claimants. 1943 Cal. Stat. 1641 (§§ 2853 and 2854). If a claimant objected to the apportionment, the state court would enter a final order determining what apportionment the claimant owed, and the order was due and payable directly to the state agency. 1943 Cal. Stat. 1641–42 (§§ 2857-2860). If the apportionment remained unpaid when the final judgment was entered, it would be included in the judgment. 1943 Cal. Stat. 1642 (§ 2861). A judgment for costs, by contrast, was a separately assessed charge that was discretionary with the court. 1943 Cal. Stat. 1638 (§ 2770).

[20] *See* Colo. Rev. Stat. § 147-9-19(4) (1953) (five dollar filing fee); Colo. Rev. Stat. § 147-9-19 (authorizing recovery of typical court costs but not investigative expenses); Kan. Stat. Ann. § 82a-704 (1949); Neb. Rev. Stat. § 46-232 (1952) (set filing fee of seventy-five cents; no express provision for entry of judgment for costs); S.D. Codified Laws § 61.0119 (expressly providing that state investigative expenses shall not be taxed as costs to private parties without their consent).

by state water conservation board). Although the state statutes did not all look in the same direction when the McCarran Amendment was enacted,[21] a majority of the States used some mechanism other than judgments for costs to recover these administrative expenses.

Contrary to the United States' suggestion, there was no uniform pattern of state laws in 1952 that would show that Congress understood that the phrase "judgment for costs" would include filing fees like Oregon's or other state methods of assessing each claimant with the administrative expenses of investigating their water rights claims. Rather, the pattern of state laws proves, if anything, that Congress would have understood that excepting only "judgment[s] for costs" from the McCarran Amendment's broad waiver of sovereign immunity left the United States responsible for paying all other fees and assessments charged water rights claimants.

The same conclusion follows from the Senate Report explaining the McCarran Amendment. The report notes that "[e]ach water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners." S. Rep. No. 755, 82d Cong., 1st Sess., 5 (1951). It explains that those services included apportioning water to decreed users and enforcing compliance with a water user's decreed rights through administrative and judicial orders. *Ibid.* The Report reasons that unless the United States is subject to state laws and state process for the administration of water rights, then "the years of building the water laws of the Western States

[21] *See* Idaho Code § 42-1401 (1948) (administrative expenses "shall constitute part of [the] costs and disbursements"); N.M. Stat. Ann. § 77-409 (1941) (costs of hydrographic survey entered as judgment for costs); N.D. Cent. Code § 61-0317 (1943) (same); Okla. Stat. § 82-13 (1951) (same).

. . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized." *Ibid.* As the Report concludes, "it is essential that each and every owner along a given water course, including the United States must be amenable to the law of the State, if there is to be proper administration of the water law as it has developed over the years." S. Rep. 755, *supra*, at 8.

The Senate Report thus recognizes that the United States should be required to follow state law for the administration of water rights, which would include the requirement in some States that each user pay fees for the services of the water master. Although the passage focuses on the administration of water rights, there is no reason to assume that Congress intended to require the United States to pay fees for administration but not adjudication of water rights. The McCarran Amendment consents to joinder in suits for both adjudication and administration, and it provides that the United States' sovereign immunity will not be a bar to the application of state law in "any such suit." In the States' view, the legislative history provides no support for the proposition that the exception for costs also was intended to except filing fees from the McCarran Amendment's broad waiver of sovereign immunity. Rather, the legislative history confirms that the exception set out in the proviso is as narrow as the words Congress chose.

CONCLUSION

For the reasons set out above, the Supreme Court of Idaho's judgment should be affirmed.

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